

# PEER HARASSMENT AND THE LAW

An Introduction to Title IX Liability by the American Civil Liberties Union of Ohio Foundation

SPRING 2000

Taunting and teasing among students are rituals as old as school itself. But not every schoolyard taunt is an innocent expression of youth. Persistent, unwanted harassment can turn a positive educational environment into a daily hell for its victims, with serious and negative psychological and educational effects, especially when the harassment has a sexual component. While the question of whether such harassment violates the civil rights of students has been debated in the courts for years, the clear outlines of a legal doctrine surrounding peer harassment are only now beginning to emerge. The following information is designed to acquaint you with the principal issues surrounding this emerging field of law. It is not intended as a substitute for individual legal advice. Civil rights cases are complex, and often turn on subtle factual details. If you or your district is facing a charge of peer harassment, or seeking to formulate a peer harassment policy, you should consult with counsel knowledgeable in the area of school law and civil rights.

## The Problem of Peer Harassment

may be worse than you think. One national study completed in 1993 found that some eighty-one percent of students had been harassed at some point during their school years, with eight-five percent of girls and seventy-nine percent of boys reporting at least one incident.<sup>1</sup> Sexual harassment at school can have serious consequences. Of students surveyed in the study at issue, twenty-nine percent said they felt less confident after having been harassed. Twenty-three percent reported not wanting to attend school as a result of the harassment, and twelve percent of those harassed dropped out of an extracurricular or an athletic activity as a result of their experience.<sup>2</sup> Self esteem, academic performance, trust in school officials and a student's sense of personal safety all may suffer when a student becomes the victim of sexual harassment at school.<sup>3</sup> Unreported harassment does not just go away: statistics indicate that unless confronted and reported, peer harassment tends to continue.<sup>4</sup> Sexual harassment is serious business, and school districts need to take it seriously: Not only does harassment carry a tremendous risk of harm for students, it also violates federal law.

## What is Title Nine, and why is it suddenly

relevant to the question of peer harassment in the schools? Title Nine is shorthand for Title IX of the Education Amendments of 1972, a portion of a broad set of laws passed by Congress designed to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.<sup>5</sup>

The *Davis* decision is likely to become the guidepost by which state and federal courts decide peer harassment

Title IX has been in effect since 1972, so you may wonder why it has suddenly become the topic of so much discussion. While the question of whether student-on-student sexual harassment has been discussed in the courts on and off for years, the issue has gained fresh attention because of a recent decision by the United States Supreme Court. In May 1999, the Supreme Court handed down its decision in *Davis v. Monroe County Board of Education*, the first High Court opinion to address the question of school district liability for student-to-student sexual harassment.<sup>6</sup>

<b>The Problem of Peer Harassment.....</b>	<b>1</b>
<b>What is Title Nine . .....</b>	<b>1</b>
<b>What Did the Davis Case Hold.....</b>	<b>2</b>
<b>When is Harassment Unlawful.....</b>	<b>2</b>
<b>How Have Other Courts Responded .....</b>	<b>3</b>
<b>What Should Schools Do To Protect Students and Themselves After Davis .....</b>	<b>3</b>
<b>Getting More Information.....</b>	<b>4</b>
<b>About the ACLU of Ohio.....</b>	<b>4</b>
<b>Notes on Sources.....</b>	<b>4</b>

cases for years to come. As such, it is important to understand both the severity of the facts which supported the holding in *Davis*, and the limits which *Davis* will impose on future claims.

## What Did the Davis Case Hold,

and what does it mean for students, administrators and educators? LaShonda Davis was a fifth grader enrolled in a public middle school in Georgia when a classmate identified only as "GF" began to harass her with increasing severity. LaShonda routinely reported the harassment -- which included sexually explicit remarks, and the groping of her breasts and genitals -- to both her mother and her home room teacher. Despite these reports, GF persisted in his misconduct.

LaShonda reported him to a gym teacher, another classroom teacher, and suffered his advances in the presence of still another teacher. When LaShonda and a group of friends tried to bring her case to the attention of the school principal, she was sent away with instructions that she would be contacted if anyone felt the need to talk with her. Despite follow up calls to school administrators from her mother, nothing was done to protect LaShonda until GF was prosecuted by local authorities for sexual battery, to which he pleaded guilty and of which he was convicted. Meanwhile, LaShonda suffered severe emotional distress, which lead her to threaten suicide and caused a marked fall of in her grades.<sup>7</sup>

LaShonda sued in federal court, and her claims were dismissed at both the trial court level and on appeal. The lower courts held that Title IX barred sex discrimination, including sexual harassment, only when that harassment resulted from the misconduct of a school employee.<sup>8</sup> The Supreme Court disagreed, and in finding the school district liable for damages to LaShonda, set forth the structure under which future peer harassment claims must be brought.

## When is Harassment Unlawful? The

quick, and not entirely inaccurate answer is always. After all, Title IX provides that no person shall be denied the benefits of an education funded even in part by the federal government on the basis of sex.

But in considering the implications of Title IX, it is important to remember that the *Davis* case creates civil, not criminal, liability for schools that fail to maintain an harassment free environment for their students. So a

better question might be: when can a school district be held liable in a federal civil rights lawsuit as the result of peer harassment? The answer given in *Davis* is: under limited circumstances where the harassment is pervasive and severe. What follows is a checklist of factors and a brief explanation of each.

- The school district in question must be the recipient of **federal funding** in order for Title IX to apply. That is because the Education Amendments themselves are based on the Congressional spending power: obedience to Title IX in this sense represents, in a condition placed on the receipt of federal funds.
- The harassment at issue needs to occur in the context of school **programs or activities** in order to give rise to district liability. This requirement comes from the text of Title IX itself, and embodies the principle that school districts can only be held liable for their own misconduct, and not that of students. So why was the Monroe District held liable based on the sexual antics of GF? Technically, it was not. Rather, the district was held responsible for its own failure to step in and correct the situation once it became aware of how Davis was being harassed.
- The harassment must be severe. In limiting its holding, the Supreme Court made plain that routine insults, banter, teasing, shoving and even gender specific comments were to be expected among school children, and that these alone do not suffice to create liability under Title IX. Only when the conduct involved is so **severe, pervasive and objectively offensive** that it deprives its victim equal access to educational opportunity does Title IX liability attach.
- Note the focus on **objectively offensive** behavior. While few would argue that GF engaged in outrageous behavior, the fact that the victim deems certain conduct insulting is not, on its own, enough to create liability.

- The conduct in question must be in some form what is considered **sexual harassment** under the law. This can involve a wide variety of misconduct, and educators should be careful not to allow their preconceptions of what constitutes sexual harassment get in the way of formulating an effective Title IX action plan. Read on for more on what might constitute sexual harassment.
- The acts of peer harassment must be **known to the school district** through its teachers, administrators or other employees before they can form the basis of liability.
- The district must fail to respond to the harassment in question with a level of disregard that amounts to a **deliberate indifference** to the rights of the students in its care. That is, the district has either reacted in a manner so inappropriate, or failed to react in a case where intervention is so necessary, that its actions or failure to act cannot be considered reasonable under the circumstances.

In contemplating these standards, it is wise to remember that the *Davis* decision is the first in what is likely to become a long line of cases refining the law of peer harassment. What sound like heavy burdens for plaintiffs, and standards protective of school districts, may become more flexible in the months and years ahead. In this regard, it is instructive to see how other federal courts have responded to the *Davis* decision.

**How Have Courts Responded** to the decision in *Davis*, and what can we learn from their decisions? At the time of this writing, only thirty-eight cases have cited the *Davis* decision nationwide, and not all of them in the context of peer harassment. These have generally applied a high standard of proof to the prior notice requirements of Title IX, reasoning for that liability to be premised on inaction, the level of awareness and potential control over peer harassment must be substantial.<sup>9</sup> Courts have found liability in connection with severe cases of sexual harassment, but have hesitated to find liability in more marginal cases.<sup>10</sup>

In short, the few federal district and appellate courts to have interpreted *Davis* have taken serious its mandate to limit liability to severe cases of harassment and inaction.

**What Should Schools Do** to protect students and themselves after *Davis*? The first and best advice is to avoid taking a complacent approach to the issue of peer-on-peer harassment. Students are entitled to a safe, harassment free learning environment. Schools should strive to provide such an environment regardless of the potential for civil liability. Taking the following steps will help to provide such an environment, the first and best step to avoiding liability under Title IX.

**Recognize that peer harassment, like sexual harassment generally, can take many forms.** It is tempting to think of harassment, especially in a secondary school setting, as male on female, but that is not always the case. In the employment discrimination context, courts have recognized that a variety of harassing conduct can amount to discrimination “on the basis of sex” including same sex harassment where both parties are straight, and harassment targeted against gay and lesbian students. Focusing on the discomfort of the victim, and avoiding stereotypes based on gender roles, will help recognize harassment in its many forms.

**Understand the various categories of sexual harassment.** Generally, most harassment falls into one of two broad categories. *Quid pro quo* harassment occurs when one party conditions an advantage on the other party being willing to submit to sexual advances. This most often, though not always, occurs in the context of a superior-subordinate relationship. Hostile environment harassment can take on a number of forms, and has been broadly defined as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by another student, a school employee, or a third party are sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or activity.”<sup>11</sup>

**Take complaints of peer harassment seriously.** Remember that one basis for liability in the *Davis* case was the repeated failure of the school district to take seriously the complaints of its students. Every report of harassment should be investigated to identify all the parties involved, verify whether the act(s) of harassment

in fact took place, establish the context in which the harassment occurred, and collect information necessary

**Institute a sexual harassment policy** that is comprehensive, fair and shaped in consultation with counsel and the community. It should define sexual harassment in clear but not exclusive terms, articulate a commitment to eliminating harassment from the learning environment and establish procedures for the reporting, investigation, punishment and resolution of cases involving harassment. The detailed steps that should be taken to formulate such a policy are beyond the scope of this Briefing Paper. We encourage you to consult the materials listed below for more information.

**Involve employees at all levels in preventing harassment.** Administrators, teachers, counselors and aides should be required to report all instances of harassment and to intervene on the spot to stop harassment when they see it. The failure of authority figures to stop harassment may be misperceived by students as tacit approval of their misconduct.

**Have an appropriate complaint and hearing mechanism in place.** Federal regulations require school districts to identify a Title IX Complaint Manager and to institute formal procedures for receiving and acting upon student and faculty complaints of discrimination and harassment. Students must know to whom their complaints should be addressed, and how a formal complaint is initiated and followed through.<sup>12</sup>

**Work to restore the victim to a healthy environment.** Remember that Title IX is intended to provide all students with a learning environment free from harassment. Schools should work toward recreating a safe, lawful environment for victims of harassment as soon as possible. Toward this end, consider segregating the perpetrator from the victim, effectuating transfers if necessary, and cooperating with law enforcement officers when a crime has been committed. Schools should be ready to provide counselors and crisis intervention when necessary, and proper psychological referrals for both the victim and perpetrator. Consider protective measure, like monitoring the harasser to avoid future incidents, and following up with the victim to assess his or her recovery. All these steps must be taken in a manner that recognizes the due process and privacy rights of the accused, as well as the statutory rights of the victim, and should ordinarily be taken in close consultations with legal counsel.

to support an appropriate response by the school district.

Getting More Information is easy. The ACLU of Ohio offers a number of publications on student and teen rights generally, as well as a host of other civil liberties issues. Excellent information on peer harassment and anti-harassment policies generally is available from the United States Department of Education Office of Civil Rights at [www.ed.gov](http://www.ed.gov). Of course, no sexual harassment policy should be implemented or changed without consulting your lawyer.

largest, oldest and most successful advocate of civil liberties in America. Since 1920, the ACLU has defended the Bill of Rights in a wide variety of contexts. A nonprofit organization, we rely for support on the contributions of our members and the efforts of volunteer attorneys and educators. You can reach us at 1266 West Sixth Street Suite 200, Cleveland, Ohio 44113-1330, or find us online at [www.acluohio.org](http://www.acluohio.org).

About the ACLU of Ohio. The American Civil Liberties Union of Ohio Foundation is the state affiliate of the American Civil Liberties Union, the

---

1. See: *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, American Association of University Women (AAUW), Washington D.C., 1993.

2. Id.

3. See: *Sexual Harassment: It's Not Academic*, Available Online from the United States Department of Education at <http://www.ed.gov/offices/OCR/ocrshpam.html>.

4. Id.

5. Relevant portions of the Education Amendments are codified at 20 U.S.C. §1681 et seq. Relevant federal regulatory law promulgated by the United States Department of Education under the authority of the education amendments is codified beginning at 34 CFR §106.1.

6. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

7. *Davis, supra*, 526 U.S. at 633-35.

8. *Davis v. Monroe County Board of Education*, 120 F.3d 1390, 1399-1401 (11th Cir. 1997) (en banc opinion).

9. See: *Reese v. Jefferson School District*, 2000 WL 320403 (9th Cir. 2000); *Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999); *Gant ex rel. Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999); *Murrell v. School District Number One, Denver*, 186 F.3d 1238 (10th Cir. 1999).

10. Compare *Soper ex rel. Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999) (rape and sexual imposition) with *Adusumilli, v. Illinois Institute of Technology*, No. 98-3561, 1999 WL 528169 (7th Cir. July 20, 1999) (occasional, episodic and unconnected instances of minor physical contact did not support liability).

11. See: *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, United States Department of Education, January 1999 (available online at <http://www.ed.gov/pubs/Harassment/policy1.html>).

12. See 34 CFR §106.